

Supreme Court, U. S.
FILED

SEP 17 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976.

No. 76-401

CITY OF LAWRENCE, INDIANA, Appellant,

v.

CITY OF INDIANAPOLIS, INDIANA; MARY D.
AIKINS, Auditor of the State of Indiana; and
LAWRENCE L. BUELL, Treasurer of Marion County,
Indiana, for and on behalf of the Department of
Transportation of Consolidated First Class City of
Indianapolis, Indiana, Appellees.

ON APPEAL FROM THE SUPREME COURT OF
INDIANA

JURISDICTIONAL STATEMENT

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Indianapolis, Indiana, Appellees.

**ON APPEAL FROM THE SUPREME COURT OF
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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Indiana entered on June 21, 1976, denying a petition to transfer from the Indiana Court of Appeals, Second District, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Court of Appeals of the State of Indiana for the Second District is reported in 338 N.E.2d 683. A copy of the opinion is appended as Appendix A.

Jurisdiction

Appellant filed this suit in the Superior Court of Marion County, Indiana, to recover its distributive share of cigarette taxes designated for its cumulative capital improvement fund as provided in the Indiana State Acts of 1967, Chapter 296, § 1, p. 966. The judgment of the Trial Court was entered on July 26, 1972, which drew into question the validity of another Indiana State Act of 1967, Chapter 311, § 19, p. 1195, on the grounds of its being repugnant to the Fourteenth Amendment to the Constitution of the United States of America [Appendix B]. The judgment of the Trial Court was in favor of its validity. On July 31, 1972, appellant filed its motion to correct errors and supporting brief preserving the constitutional question, which was overruled July 31, 1972, and a timely appeal followed. The judgment of the Trial Court was affirmed by the Court of Appeals, State of Indiana, Second District, on December 18, 1975. Thereafter, appellant's timely petition for rehearing was denied on January 20, 1976, and appellant's timely petition for transfer to the Indiana State Supreme Court was denied on June 21, 1976. Notice of appeal was filed with the Clerk of the Supreme Court of Indiana on September 3, 1976. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c).

Statutes Involved

The statutes of the State of Indiana specifically involved in this appeal are lengthy. Their pertinent texts are set forth verbatim as enacted in Appendix C. They are Acts 1967, Chapter 296, § 1, p. 966; IC 1971, 6-7-1-32; IND. ANN. STAT., § 64-2928d (Burns, 1972); Acts 1967, Chapter 311, § 19, p. 1195; IC 1971, 19-5-3-18; IND. ANN. STAT., § 36-3449(a) (Burns, 1972); and Acts 1969, Chapter 173, § 1403, p. 357; IC 1971, 18-4-14-3; IND. ANN. STAT., § 48-9505 (Burns, 1972). Copies of the judgment, order on rehearing, order on petition to transfer and notice of appeal are appended as Appendix D, E, F and G, respectively.

Questions Presented

The questions presented are:

(a) Whether the enactment of said statute and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty or property without due process of law and that all persons shall be accorded the equal protection of the laws, or

(b) Any other denial of federal rights whether or not capable in itself of being brought here by appeal.

Statement of Case

The first paragraph of the above mentioned Cigarette Tax Act [Appendix B] was enacted as a public revenue law in 1965 imposing a tax on cigarettes [Ch. 229, § 5, p. 524, IND. ANN. STAT., § 64-2928d]. One-third of the net amount was appropriated for distribution to the cumu-

lative capital improvement fund of cities and towns in like proportion as the population of each city or town related to the total population of all cities and towns of the State as determined by the last preceding United States decennial census. The State Auditor was to distribute said taxes on the first day of June and December of each year as designated by the State Department of Revenue [Tr., p. 39, l. 21—p. 40, l. 6]. Appellant created its cumulative capital improvement fund [Tr., pp. 49-50] and received its share in December 1965 and June and December of 1966 [Tr., p. 51].

In 1967 two bills were introduced into the Indiana State Legislature and subsequently passed, as amended. H.B. 1195 was part of legislation creating a Mass Transportation Authority (MTA) in Marion County, Indiana [Ret. Wr., p. 4]. S.B. 483 amended the 1965 Cigarette Tax Act by adding the last two paragraphs.

Section 20(10) of H.B. 1195, as originally introduced, provided that eighty percent of appellant's share (as an excluded city from Indianapolis) was to go to MTA [p. 18 of appellee's brief]. This was stricken and amended, by a vote of 94-0 [Ret. Wr., p. 8], that the cigarette taxes available for distribution to excluded cities "*shall be paid over and remitted to that city or town and none to the authority as provided in this act.*" and referred to the Senate. (emphasis supplied) [Ret. Wr., p. 5-6]

Five days later S.B. 483 was introduced. It appropriated a portion of Indianapolis' distributive share of cigarette taxes to the Capital Improvement Board of Managers of Marion County to pay principal and interest on bonds issued to construct the Convention Center south of the Indiana Capitol. It was the intent of the General Assembly that such appropriation was to be deducted from the distributive share of first class cities only and nothing was to

be construed as reducing the amount theretofore appropriated for distribution to other cities and towns in the State. Another section of S.B. 483 provided that the remaining funds available for distribution to first class cities was to go to MTA. Section 1(10) of S.B. 483 contained a similar provision that eighty percent of appellant's share (as an excluded city) was to go to MTA [Tr., p. 122, l. 69—p. 123, l. 79]. This eighty-percent provision was also stricken and amended by a 39-1 vote [Ret. Wr., p. 60], providing:

"It is the intent of the General Assembly that said appropriation to the Metropolitan Thoroughfare Authority shall be appropriated from the distributive share of cities of the first class *only*, and *nothing* herein *shall be construed* as reducing the amount theretofore appropriated for distribution to the Cumulative Capital Improvement Fund of other cities and towns of the state." (emphasis supplied) [Ret. Wr., p. 59]

Still another five days later, the Senate amended H.B. 1195, and, consistent with the previous 94-0 amendment to H.B. 1195, provided that the cigarette taxes going to MTA would be only those funds made available for distribution pursuant to said 39-1 amendment which was enacted as part of the last paragraph of the 1967 Cigarette Tax Act [Ret. Wr., p. 35-41]. The last amendment to H.B. 1195 [Ret. Wr., p. 37] became a part of the MTA Act. Since it involves the key question in this appeal, it will be discussed later in more detail.

Other provisions of the MTA Act gave that authority power, among other things, to collect thoroughfare taxes, borrow funds, adopt an annual budget and levy taxes thereon for its payment by way of creating a special taxing district to pay for the entire cost of the MTA operation. This special taxing district included appellant's corporate boundaries and affected all of its residents. Such special

tax was declared to be and constituted the amount of benefits derived to all of said property.

In 1969 the Indiana State Legislature enacted a Consolidated First Class Cities Act in which a Department of Transportation (DOT) was created for the City of Indianapolis which assumed all of the powers, obligations and duties of the MTA. It also provided for a similar tax on all property to pay for the total cost of DOT which constituted the amount of benefits derived. It also provided that it shall not *affect or limit* the right of each excluded city to receive the same allocations of monies collected by the State of Indiana as are allocated to the same under applicable law; it specifically referred to allocations from the *said cigarette tax fund*.

Even though the Department of Revenue continued designating appellant's distributive share to the Auditor for payment, after passage of said 1967 Acts the Auditor paid appellant's share to MTA. After passage of the Consolidated First Class Cities Act, the Auditor paid and is still paying appellant's share for use by DOT [Tr., p. 89].

The appellant instituted this action in the State Court to recover its distributive share, plus interest [Tr., pp. 37-51]. First, the appellant claimed it was not the intentions or policy of the 1967 Legislature to give appellant's distributive share of said cigarette taxes to MTA [Tr., pp. 31-46]. Second, if this was the Legislative intent, then it violated and was repugnant to appellant's rights as provided in the Fourteenth Amendment to the Constitution of the United States of America.

The Trial Court issued findings of fact, conclusions of law and judgment on the appellees' oral motion for summary judgment in favor of appellees and against the appel-

lant on both questions [Tr., pp. 137-141], from which an appeal was taken.

How the Federal Question was Presented. The question was presented in the State Trial Court in the complaint [Tr., p. 46, l. 21—p. 47, ll. 11] and again in the motion to correct errors [Tr., p. 143, ll. 31-32]. They were preserved, properly presented, and argued at pages 49-71 of appellant's brief before the Indiana Court of Appeals, as well as in the petition for rehearing before that Court. They were preserved and argued at pages 23-33 in appellant's brief supporting the petition for transfer to the Supreme Court of Indiana.

A decision on such question is necessary for a determination of this case because the findings or conclusions of law as to the appellant's federal rights are so interwoven and intermingled with its non-federal rights that one cannot be decided without deciding the other. The question is so substantial that it requires plenary consideration by this Court with briefs on the merits and oral argument for its resolution.

The Court of Appeals in its written opinion specifically found that the 1967 Amendment to the Cigarette Tax Act and the 1967 Acts creating MTA were approved on the same day, 338 N.E.2d 684. Then, it held there was no infringement of appellant's constitutional privileges since appellant's distributive share was taken under the MTA Act; whereas had it been taken away under the Cigarette Tax Amendment Act, it would have been unconstitutional, 338 N.E.2d 689.

The Question is Substantial

This case is novel and unsettled. It involves the immediate rights of 50,000—75,000 residents of appellant and three

other excluded cities in Indiana and approximately a half-million of their tax dollars which are being wrongfully and arbitrarily taken away from them each year and given to another city to help pay its bills, while all other cities and towns in the State of Indiana have been allowed to continue receiving their distributive shares.

Appellant is an independent, viable, responsible government with functions, duties and liabilities similar to all other cities and towns in and out of the State. *Dortch v. Lugar*, (1971) 255 Ind. 545, 266 N.E.2d 25. Yet, this decision has already forced appellant to impose greater tax burdens upon its citizens for funds to do what other cities and towns in the State are doing without having to levy such additional taxation. It is so shockingly wrong and creates such a gross miscarriage of justice that it cannot be sustained on any independent grounds of State law as being in harmony with appellant's federal rights to equal protection of the Fourteenth Amendment forbidding one class to suffer losses so that others may gain. *Cincinnati H. & D. Ry. Co. v. McCullom*, (1915) 183 Ind. 556, 109 N.E. 206, affirmed 245 U.S. 632; *State v. Richcreek*, (1906) 167 Ind. 217, 77 N.E. 1085.

If this taking of appellant's cigarette taxes is sanctioned, it will open wide the door for further legislation of the same vicious and unhibited character. See, *Appeal of Ayars*, (1889) — Pa. —, 16 A. 356. For example, the taking of appellant's share of motor vehicle taxes, alcoholic beverage taxes, federal revenue sharing, etc., could and probably would follow. There might be no limit, even to cities and towns at great distances from each other. *Simon v. Northrup*, (1895) 27 Or. 487, 40 P. 560. For example, the appellant recently doubled its size when its annexation of the Town of Oaklandon, Indiana, and the Indian Creek area east of Lawrence was upheld. Their share of cigarette

tax funds is *desperately needed* to help provide the additional services and facilities required and deserved by said new residents. Yet, their cigarette taxes go to DOT, too, under this decision, even though they are still subject to still an independent tax by DOT to pay for its total cost. If this power is left unrestrained it will surely destroy and could spread across the country.

It is a general rule every where that statutes enacted in the same session of the legislature concerning the same subject matter are in *pari materia* and should be taken together as one law. *Wells v. Supervisors*, (1880) 102 U.S. 625.

Instead of being guided by a single sentence or a *part of a sentence*, courts look to the provisions of the whole law and give effect to every word and clause used in the act to sustain its object and general policy. *U.S. v. Boe's Dore's Heirs*, (1850) 49 U.S. 113; *Combs v. Cook*, (1958) 238 Ind. 392, 151 N.E.2d 144. When isolated parts are considered in arriving at a decision, this is grounds for a reversal. *Mary v. Lindley*, (1912) 54 Ind. App. 157, 99 N.E. 790.

In the written opinion of the Court of Appeals, it states:

"Lawrence's arguments must fail. Section 19(8) of the MTA Act clearly and unambiguously states that the Mass Transportation Authority is to receive 'Any and all money in the Cigarette Tax Fund of the State available for distribution to the cities and towns in the County for deposit in the Cumulative Capital Improvement Funds of such cities and towns ...'"

The Court of Appeals omitted and failed to consider the rest of that *very same sentence*, which the Senate included when it amended H.B. 1195, as stated previously. It is the crux of this law suit, and reads as follows:

“pursuant to Acts of 1947, chapter 222 [§ 64-2901—64-2929], as last amended by Acts of 1965, chapter 225, or as later amended or superseded.”

The omitted part is the key to carrying out the will and general policy of the Legislature, as demonstrated by said 94-0 and 39-1 amendments. It is also supported by its exclusion from consideration.

It is proper to resort to the reports of committees, including a consideration of the bill as introduced, the changes made in the frame of the bill in the course of its passage in interpreting statutes. *U.S. v. St. Paul, M. & M. Ry. Co.*, (1918) 247 U.S. 310. Frequently, such legislative history of a statute is the most fruitful source of instructions as to its proper interpretation. *U.S. v. Zacks*, (1963) 375 U.S. 59; *U.S. v. Wise*, (1962) 370 U.S. 405; *Flora v. U.S.*, (1960) 362 U.S. 145.

An additional and important factor is a consideration of the remaining subsections of Section 19 of the MTA Act on financing. They reveal that in order to calculate the amount of funds available for distribution to MTA under all of the nine remaining subsections, each one refers to still another Act or source which actually determines that amount. Thus, Subsection 8, which is involved in this action, is not and should not be treated any differently.

When all of the above factors are considered in construing the subject subsection, it becomes crystal clear there was no intent or general policy of the Legislature to preserve and protect the appellant's right to continue receiving its distributive share of cigarette taxes in one-half of the relevant law, which was carefully done, and then take those same funds away from appellant and give them to another city in the other half of the same law. This could only be done by omitting and failing to consider

the key portion of the whole law preserving and protecting appellant's rights to continue receiving its share. In so doing, appellant's rights to equal protection of the laws under the Fourteenth Amendment in the interpretation and application of this taxing power were violated.

Alternately, if the Legislature fully intended to take appellant's share from it in the manner that was done, could there be any clearer case of special or class legislation which had as its sole object an attempt to evade the constitutional prohibitions otherwise placed on it? The Court of Appeals not only recognized this procedure but sanctioned it in its opinion as being proper. *Appeal of Ayars*, supra. Of all forms of general legislation, this is of the kind that is the most vicious and damaging, which appellant's rights prohibit under the protection of the Fourteenth Amendment. *Ibid.*

Conclusion

The decision of the Court of Appeals and judgment of the Trial Court should be reversed. The appellant's distributive share of said cigarette taxes should be ordered paid to it by appellees, plus lawful interest and costs, and the Indiana State Auditor should be ordered to distribute appellant's future designated share to it under the existing law.

Respectfully submitted,

William D. Hall

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APPENDIX

APPENDIX A

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**IN THE
Court of Appeals of Indiana**

SECOND DISTRICT

CITY OF LAWRENCE, INDIANA,)	
Appellant,)	
v.)	
CITY OF INDIANAPOLIS,)	
INDIANA;)	
MARY D. AIKINS, Auditor of the)	NO. 2-174 A 27
State of Indiana; and LAWRENCE L.)	
BUELL, Treasurer of Marion County,)	
Indiana, for and on behalf of the)	
Department of Transportation of)	
Consolidated First Class City of)	
Indianapolis, Indiana,)	
Appellees.)	

**APPEAL FROM THE SUPERIOR COURT OF MARION
COUNTY, ROOM NO. 4**

The Honorable Frank A. Symmes, Jr., Judge

WHITE, J.

The appellant City of Lawrence (Lawrence), a third class city located in Marion County, instituted this action by filing its complaint alleging that since 1967 it had not received its proper share of distributions made from the cigarette tax fund, that a portion of said proper share had been wrongfully paid by the Auditor of State first to the Mass Transportation Authority of Greater Indianapolis and subsequently to the Department of Transportation of the Consolidated City of Indianapolis, and that the recipients of said funds have been and are wrongfully withholding said funds from Lawrence. The complaint sought to have the funds alleged to have been improperly distributed declared the property of Lawrence, that the holders of said funds be ordered to turn said funds and interest thereon over to Lawrence, and that the Auditor of State be ordered to make future distributions of cigarette tax funds in accord with law.

The trial court entered summary judgment in favor of the defendants and Lawrence has appealed that judgment.

We affirm.

The two questions presented by Lawrence's complaint are straightforward questions of statutory construction which are buried in prolix pleadings. The first question involves two enactments of the 1967 Regular Session of the General Assembly, chapter 296, which amended the cigarette tax act, and chapter 311, which created a Mass Transportation Authority in Marion County.¹ The question is: In view of the aforementioned enactments, is it Lawrence or is it the Mass Transportation Authority that is the proper recipient of certain moneys distributed from

¹ Both Acts were approved on March 11, 1965[7]. Chapter 296, amending the cigarette tax act, declared an emergency and became effective July 1, 1965[7]; Chapter 311, creating the Mass Transportation Agency, declared an emergency and became effective upon passage.

the cigarette tax fund? The second question involves the effect of Acts of 1969, chapter 173 (Uni-Gov), on the distribution of the same moneys. The question is: Is it Lawrence or is it the Department of Transportation of the Consolidated City of Greater Indianapolis (which assumed the duties of the Mass Transportation Authority) that is the proper recipient of certain moneys distributed from the cigarette tax fund?

I.

The cigarette tax act (Acts of 1947, ch. 222) levies a tax on the sale of cigarettes and has evolved by amendment from a simple source of money for the State's general fund into a source of money to be distributed in a somewhat complex pattern to the State general fund, to various specified state agencies, and to local municipal corporations for specified purposes. We need not delve into the development of the pattern of distribution of the fund, nor even describe that pattern in detail. It is sufficient to note that prior to the effective date of the 1967 Acts in question, the cigarette tax act, as then last amended by Acts of 1965, ch. 225, created a cigarette tax fund and, in three separate sections, appropriated portions of that fund to the cities and towns in Indiana. Section 27b appropriated a portion of the cigarette tax fund to the general funds of cities and towns; Sections 27c and 27d each appropriated a portion of the cigarette tax fund to the cumulative capital improvement funds of the cities and towns. In all three instances the appropriation was to be allocated among and distributed to the cities and towns in proportion to their populations.

The 1967 amendment of the cigarette tax act, Acts of 1967, ch. 296 (hereinafter called the "Tax Amendment"), did not change the basic distribution of the cigarette tax

fund, but it did add special provisions concerning the distribution to be made to the Cumulative Capital Improvement Fund of Indianapolis.

Section 27d was amended by adding to it the following language:

"Except, that, on and after July 1, 1967, the sum of Three Hundred Fifty Thousand Dollars out of the appropriation theretofore made for distribution to the Cumulative Capital Improvement Fund of cities of the first class pursuant to this section is hereby appropriated to the Capital Improvement Board of Managers of the county created by Chapter 326 of the Acts of the Indiana General Assembly of 1965 to be used for the payment of principal and interest on any bonds issued or to be issued pursuant to the authority of said Chapter 326 of the Acts of 1965 or any acts amendatory or supplemental thereto. Said sum shall be distributed semi-annually on the first day of June and December in each year and paid to the treasurer of such County upon warrants issued by the Auditor of State. The County Treasurer shall deposit all amounts received pursuant to this section in the Capital Improvement Bond Fund created by Section 13 of said Chapter 326 of the Acts of 1965. It is the intent of the General Assembly that said appropriation to such board of Managers shall be deducted from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated for distribution to the Cumulative Capital Improvement Fund of other cities and towns of the state.

"Provided further, that the remaining funds available for distribution to the Capital Improvement Fund of cities of the first class pursuant to this Act is hereby appropriated to the Metropolitan Thoroughfare Authority created pursuant to Acts 1963, ch. 386, or to any thoroughfare or transportation Authority subsequently created in a city of the first class for use

by such Authority. Said funds shall be distributed semi-annually on the first day of June and December each year and paid to the treasurer of the county in which such Authority is situated upon warrants issued by the Auditor of State. The county treasurer shall accept said funds pursuant to said Act and the custody of such funds shall be governed by the provisions of said Act. It is the intent of the General Assembly that said appropriation to such Authority shall be appropriated from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated to the Cumulative Capital Improvement Fund of other cities and towns of the State.

Section 27c was also amended to provide in pertinent part:

"(c) . . . provided, that all sums to be distributed in accordance with this subsection to Cumulative Capital Improvement Funds in cities of the first class is hereby appropriated to the Metropolitan Thoroughfare Authority created pursuant to Acts 1963, ch. 386 or to any thoroughfare or transportation authority subsequently created in a city of the first class, for use by any such Authority said funds shall be distributed semi-annually on the first day of June and December each year and paid to the treasurer of the county in which such Authority is situated upon warrants issued by the Auditor of State. The county treasurer shall accept said funds pursuant to said Act and the custody of such funds shall be governed by the provisions of said Act.

"It is the intent of the General Assembly that said appropriation to such Authority shall be appropriated from the distributive shares of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated to the Cumulative Capital Improvement Fund of other cities and towns of the State . . ."

Thus the Tax Amendment appropriated to the Capital Improvement Board of Managers of Marion County and to the Metropolitan Thoroughfare Authority of Marion County, two county-wide agencies, all the cigarette tax fund moneys that would otherwise be distributed to the cumulative capital improvement fund of Indianapolis. The Tax Amendment also repetitiously specified that it, the Tax Amendment, was not to adversely affect the distribution of cigarette tax funds to the cumulative capital improvement fund of any other city or town, including, though not specifying, Lawrence.

The 95th General Assembly subsequently enacted Acts of 1967, chapter 311 (hereinafter called the "MTA Act"), which created the Mass Transportation Authority of Marion County, a distinct municipal corporation with boundaries coterminous with the boundaries of Marion County.

This new municipal corporation was the successor to the Metropolitan Thoroughfare Authority referred to in the Tax Amendment, a fact clearly shown by the pertinent part of Section 3 of the MTA ACT:

"(14) Upon the effective date of the enactment of this act, the [Mass Transportation] Authority shall succeed to and assume all of the powers, property, obligations and duties of the Metropolitan Thoroughfare Authority of the County authorized by Acts 1963, c. 386. The board of directors created pursuant to that act shall serve as directors of the [Mass Transportation] Authority until their successors have been appointed and qualified as provided in this act."

It is thus clear that even if the MTA Act had no provisions whatever for the funding of the Mass Transportation Authority, that agency, as the successor of the Metropolitan Thoroughfare Authority, would be entitled to the funds allocated to the Thoroughfare Authority by the Tax

Amendment (i.e., the portion that would otherwise be allocated to Indianapolis' capital improvement fund less \$350,000.00 appropriated to the Capital Improvement Board). It is, of course, equally clear that absent any special funding provisions in the MTA Act the allocation and distribution of cigarette tax funds to the cumulative capital improvement funds of other cities and towns in Marion County, including Lawrence, would be unaffected by the passage of that MTA Act.

However, the MTA Act does specifically mention the cigarette tax fund distribution. Section 19 of the MTA Act concerns the financing of the newly created municipal corporation and provides in pertinent part:

"Financing. (a) In order to provide funds for carrying out the duties, powers and obligations of the Authority, the Authority shall receive the following money on and after the effective date of this Act, except as provided in this section:

• • • • •

"(8) Any and all money in the Cigarette Tax Fund of the State available for distribution to the cities and towns in the County for deposit in the Cumulative Capital Improvement Funds of such cities and towns pursuant to Acts of 1947, c. 222, as last amended by Acts of 1965, c. 225, or as later amended or superseded. The Auditor of State shall pay over such money, as it becomes available for distribution, to the Controller of the Authority. Provided, however, that such money allocated to cities and towns for their respective general funds is not included herein and shall continue to be distributed and paid to the cities and towns in the County as provided by said Acts of 1947, c. 222, [§ 27b, not involved herein] as amended or superseded. Provided, further, that all funds appropriated to the Capital Improvement Board of Managers of the County by the 95th General Assembly from such cigarette tax funds shall be paid to the Treasurer of

the County for the use of said Capital Improvement Board, and nothing herein shall be deemed to affect or reduce said appropriations."

All parties agree that from the semi-annual distribution in July, 1967² to and including the distribution in December, 1969, the Auditor of State computed Lawrence's pro rata allocation of the appropriations to the cumulative capital improvement funds of cities and towns as provided in sections 27c and 27d of the cigarette tax act, but forwarded that share to the Mass Transportation Authority rather than to Lawrence.

Appellant Lawrence first argues that the intent of the 95th General Assembly in enacting the Tax Amendment and the MTA Act was to appropriate to the Mass Transportation Authority only the cigarette tax fund allocation to Indianapolis' cumulative capital improvement fund as specified in the Tax Amendment. To support this contention Lawrence recites in great detail the history of the two enactments as they progressed through the legislative process, listing amendments adopted and amendments rejected as well as specifying dates and results of votes thereon. Lawrence also points to sections 15 and 16 of the MTA Act, which sections authorize the Mass Transportation Authority to adopt a budget and to levy property taxes in the amount necessary to fully implement that budget. Lawrence argues that these sections prove that the Authority is to receive its funds from property taxes levied on all taxable property in Marion County rather than from Lawrence's rightful share of the cigarette tax fund. Lawrence concluded that the language contained in section 19(8) of the MTA Act, set out above, is not intended to be in itself an appropriation of any portion of the cigarette

² The MTA Act declared an emergency and became effective upon passage, March 11, 1967.

tax fund, but is instead intended merely to authorize the Mass Transportation Authority to receive and accept whatever moneys might be appropriated to it by the Tax Amendment.

Lawrence's arguments must fail. Section 19(8) of the MTA Act clearly and unambiguously states that the Mass Transportation Authority is to receive "Any and all money in the Cigarette Tax Fund of the State available for distribution to the cities and towns in the County for deposit in the Cumulative Capital Improvement Funds of such cities and towns..."

There is no conflict between Section 19(8) and the tax levying power granted by sections 15 and 16. Indeed, section 19 of the MTA Act specifies ten different sources of funds for the Mass Transportation Authority. The property taxes authorized by sections 15 and 16 are the second specified source, cigarette tax fund distributions are the eighth.

Nor are the Tax Amendment and the MTA Act conflicting. The Tax Amendment appropriates a certain portion of the cigarette tax fund to the Mass Transportation Authority; the MTA Act appropriates that same portion plus an additional portion. Each is a separate appropriation; neither, on its face, limits the other. Nor, apparently, was the MTA Act passed in ignorance of the Tax Amendment since it carefully and specifically preserves the appropriation to the Capital Improvement Board contained in that enactment.

Finally, the language of Section 19(8) of the MTA Act is clearly language of appropriation rather than of authorization to accept. It explicitly directs the Auditor of State to pay over the moneys specified therein to the Controller of the Authority; it impliedly authorizes the Controller

to accept those moneys, it (subsection 8) neither explicitly nor impliedly authorizes the Controller to accept any funds that might be appropriated by other legislation. Such an appropriation of cigarette tax fund moneys by an independent and basically unrelated enactment is authorized by the cigarette tax act which, in its section 27, establishes the cigarette tax fund "for the purposes for which appropriations are made by this act or other law."

As was said in *Meade Electric Co. v. Hagberg* (1959), 129 Ind. App. 631, 640, 159 N.E. 2d 408, 413:

"There are numerous cases which follow the rule that where the language or statute is clear and plain there is no room for construction, and courts have no power to supply supposed defects or omissions or to resort to construction for the purpose of limiting or extending its operation, and judicial construction is not allowable to interpret the law which is plain upon its face. *Taelman v. Bd. of Fin. of School City of South Bend* (1937), 212 Ind. 26, at page 33, 6 N.E. 2d 557, *Bd. of Election Commissioners of Gibson Co. v. State ex rel. Sides* (1897), 148 Ind. 675, at 678, 48 N.E. 226; *Poyser v. Stangland* (1952), 230 Ind. 685, 106 N.E. 2d 390."

Lawrence's second argument is that if the MTA Act be interpreted as providing that the Mass Transportation Authority receive the cigarette tax fund allocation to Lawrence's cumulative capital improvement fund, then that portion of the Act is a special and local law in violation of Article 4, Sections 22 and 23, of the Indiana Constitution, and a violation of the privileges and immunities clauses of both the Indiana and United States Constitutions.

Lawrence's constitutional arguments are somewhat interwoven but the thrust of those arguments is:

1. That so interpreted the MTA Act arbitrarily distinguishes between Lawrence and cities and towns located outside Marion County in relation to cigarette tax fund distributions;

2. That so interpreted the MTA Act takes money that should be distributed to Lawrence, and thus is the property of Lawrence, and gives that money to the City of Indianapolis.

Lawrence argues that it is a city having the same duties, functions and responsibilities as all other cities in the state and therefore has the same right as do those cities to its proper share of cigarette tax fund money. While admitting that classification is permissible in certain instances (e.g., "Plaintiff has no quarrel with the legislative determination that the City of Indianapolis was of sufficient size it would allow only that City to use its cigarette tax funds in a manner different from all other cities"), Lawrence maintains that the classification must be reasonable and that, unlike Indianapolis, Lawrence possesses no special characteristic that would justify treating it differently from other cities in relation to cigarette tax funds. Lawrence's argument would be feasible if the classification in relation to cigarette tax funds were made by the Tax Amendment and if the classification singled out Lawrence by some arbitrary standard (i.e., cities located next to an Army base in the northeast corner of a county containing a city of the first class). However, the classification is made by the MTA Act, an act applying to "counties in which a city of the first class is situate", and applying equally to all cities and towns located in counties within that classification. Lawrence does not question the validity of the legislative determination that counties in which a city of the first class is situate have transportation problems sufficiently complex to create a special authority in

such counties, nor does Lawrence claim any difference in treatment between it and all other cities and towns in such counties.

Lawrence's argument that its moneys were given to the City of Indianapolis appears to be derived from a misunderstanding of the MTA Act. Although the entity created therein is styled "Mass Transportation Authority of Greater Indianapolis", it was not intended to be an agency or division of the City of Indianapolis. It was, instead, created as a separate and distinct municipal corporation with boundaries coterminous with the boundaries of Marion County (§ 2), boundaries that include both the City of Indianapolis and the City of Lawrence. As originally established the Board of Directors of the Authority consisted of six appointed members, half of whom were to be appointed by county boards: two by the county commissioners, one by the county council (§ 4). Acts of 1969, ch. 235, § 3, amended the MTA Act to create a five member board of directors, three of whom were to be appointed by the county council.³ The Authority's jurisdiction, duties and responsibilities were to be exercised throughout the county (§ 3).

Under no reasonable interpretation of the MTA Act could it be said that those funds given to the Authority were funds given to Indianapolis. In beneficial effect they were given to all of Marion County, including Lawrence. That being true, were we to interpret the legislation involved herein as Lawrence desires the net result would be to transfer a part of Indianapolis' share of the cigarette tax fund to the Mass Transportation Authority for the benefit of Lawrence and the other cities and towns in

³ This amendment was in practical effect nullified by Acts of 1969, Chapter 173 (Uni-Gov), which abolished both the county council and the Mass Transportation Agency.

Marion County while permitting those same cities and towns to retain all of their share of such funds for their own use.

There is no unfairness and no constitutional defect in the statutory provision that the Mass Transportation Authority of Greater Indianapolis receive all the payments from the cigarette tax fund that would otherwise be distributed to the cumulative capital improvement funds of the individual cities and towns located within the boundaries of the Authority.

II.

Lawrence further contends that even if the MTA Act did lawfully appropriate some of Lawrence's share of cigarette tax fund distribution to the Mass Transportation Authority that appropriation was terminated by the passage of Acts of 1969, chapter 173 (Uni-Gov), and to sustain this proposition presents the same arguments it presented to sustain its first contention (i.e., legislative intent and unconstitutionality).

Without discussing these arguments individually we note:

1. That section 1401 of the Uni-Gov Act, as found in Ind. Ann. Stat. § 18-4-14-1 (Burns Code Ed.) concerns financing for the Consolidated City and provides in pertinent part:

"(9) Any and all money in the Cigarette Tax Fund of the State available for distribution to the First Class City or any separate authority within the County shall be distributed as follows: All amounts appropriated to the Capital Improvement Board of Managers of the County pursuant to Acts 1947, c. 222, and Acts 1967, c. 296, shall be paid and handled as prescribed and provided by such acts. All amounts distributable

to a transportation authority pursuant to Acts 1947, c. 222, or Acts 1967, c. 311, shall be paid to the Treasurer of the County for the use of the Department of Transportation. Any money distributable to the Consolidated City for the use of the General Fund thereof shall be paid to the Consolidated City."

2. That section 1003, as found in Ind. Ann. Stat. § 18-4-10-3 (Burns Code Ed.) confers powers, duties and obligations upon the Department of Transportation and provides in pertinent part:

"(b) All Transportation Powers heretofore or hereafter conferred by law upon the board of county commissioners, the county surveyor, the county highway department or the county council of the county.

"(c) All the powers, obligations and duties of the Mass Transportation Authority created by Acts 1967, c. 311, and the Metropolitan Thoroughfare Authority created by Acts 1963, c. 386."

Thus in an act that has already been held constitutional (*Dortch v. Lugar* [1971], 255 Ind. 545, 266 N.E. 2d 25), the General Assembly has clearly expressed the intent that the moneys from the cigarette tax fund that would otherwise be distributed to the Mass Transportation Authority pursuant to the MTA Act (i.e., those funds that, were it not for the MTA Act, would be distributed to the cumulative capital improvement funds of Lawrence and all other cities and towns in Marion County) shall be, instead, distributed to a municipal agency with county-wide jurisdiction, duties and obligation.

The judgment is

Affirmed.

Sullivan, P.J., and Buchanan, J., concur.

APPENDIX B

Constitutional Provision Involved

The Fourteenth Amendment, § 1, to the Constitution of the United States of America reads as follows:

"§1. **Citizenship—Due process of Law—Equal protection.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

Statutes Involved

Acts 1947, ch. 222, § 27d, as added by Acts 1965, ch. 225, § 5, p. 524; 1967, ch. 296, § 1, p. 966; IC 1971, 6-7-1-32, IND. ANN. STAT., § 64-2928d (Burns, 1972), reads as follows:

"6-7-1-32 [64-2928d]. Disposition of cigarette tax fund—Cumulative capital improvement fund of cities.
—On and after July 1, 1965 one-third [$\frac{1}{3}$] of the entire amount of the cigarette tax fund of the state of Indiana remaining after charges thereto required by section 27a [6-7-1-29] hereby is appropriated for distribution to the cumulative capital improvement fund of cities and towns in like proportion as the population of each city or town bears to the total population of all cities and towns of the state, as determined by the last preceding United States decennial census. The distribution of said sum shall be computed by the auditor of state semi-annually to effect distribution thereof on the first day of June and December in each year, and the auditor of state shall draw warrants to the treasurer of each city or town as designated in the distribution presented to the auditor by said department of revenue.

"Except, that, on and after July 1, 1967, the sum of three hundred fifty thousand dollars [\$350,000] out of the appropriation theretofore made for distribution to the cumulative capital improvement fund of cities of the first class pursuant to this section is hereby appropriated to the capital improvement board of managers of the county created by chapter 326 [18-4-17-1—18-4-17-21; Burns' §§ 26-2801—26-2821] of the Acts of the Indiana General Assembly of 1965 to be used for the payment of principal and interest on any bonds issued or to be issued pursuant to the authority of

said chapter 326 [18-4-17-1—18-4-17-21; Burns' §§ 26-2801—26-2821] of the Acts of 1965 or any acts amendatory or supplemental thereto. Said sum shall be distributed semi-annually on the first day of June and December in each year and paid to the treasurer of such county upon warrants issued by the auditor of state. The county treasurer shall deposit all amounts received pursuant to this section in the capital improvement bond fund created by section 13 [18-4-17-13; Burns' § 26-2813] of said chapter 326 of the Acts of 1965. It is the intent of the general assembly that said appropriation to such board of managers shall be deducted from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated for distribution to the cumulative capital improvement fund of other cities and towns of the state.

"Provided further, That the remaining funds available for distribution to the capital improvement fund of cities of the first class pursuant to this act is hereby appropriated to the metropolitan thoroughfare authority created pursuant to Acts 1963, ch. 386 [19-5-4-1—19-5-4-21; Burns' §§ 36-3401—36-3420], or to any thoroughfare or transportation authority subsequently created in a city of the first class for use by such authority. Said funds shall be distributed semi-annually on the first day of June and December each year and paid to the treasurer of the county in which such authority is situated upon warrants issued by the auditor of state. The county treasurer shall accept said funds pursuant to said act and the custody of such funds shall be governed by the provisions of said act. It is the intent of the general assembly that said appropriation to such authority shall be appropriated from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated to the cumulative capital improvement fund of other cities and towns of the state."

Acts 1967, ch. 311, § 19, p. 1195; 1969, ch. 235, § 10, p. 871; IC 1971, 19-5-3-18 (a), IND. ANN. STAT., § 36-3449(a) (Burns, 1972), reads as follows:

"19-5-3-18 [36-3449, 48-2468]. Financing. — (a) In order to provide funds for carrying out the duties, powers and obligations of the Authority, the Authority shall receive the following money on and after the effective date [March 11, 1967] of this act, except as provided in this section:

"(1) After December 31, 1969, all of the aggregate of allocated amounts of money collected and available for distribution to the County or the City in the motor vehicle highway account fund of the state as provided for in Acts 1941, c. 168 [8-14-1-1—8-14-1-8], as last amended in Acts 1969 [1965], c. 121, 223, or as later amended or superseded. The auditor of state shall pay over such money, as it becomes available for distribution, to the controller of the Authority. For purposes of such distribution, all roads under the control of the Authority outside of the boundaries of the City shall be a part of the County highway system.

"(2) Any and all money collected from the levy of taxes on property as provided in sections 15 and 16 [19-5-3-14, 19-5-3-15] of this act and collected by the County treasurer.

"(3) Any and all money now available or which shall become available from the federal government through the federal bureau of public roads or any other federal agency created and organized for the disbursement or allocation of federal funds in furtherance of any powers of the Authority.

"(4) Any and all money that may at any time be appropriated by the state of Indiana in furtherance of any powers of the Authority.

"(5) Any and all money heretofore collected and either paid over or payable to the treasurer of the County for the account of any metropolitan thorough-

fare authority in the County created under the provisions of Acts 1963, chapter 386.

"(6) Any and all money received as proceeds from the sale of bonds of the Authority as provided in this act [19-5-3-1—19-5-3-25].

"(7) Any and all money to be collected by the Authority pursuant to any acts providing for the use of parking meters under the control of the Authority, subject to the fulfillment of any obligation pertaining to the collection of such money pursuant to any bonded indebtedness assumed by the Authority.

"(8) Any and all money in the cigarette tax fund of the state available for distribution to the cities and towns in the County for deposit in the cumulative capital improvement funds of such cities and towns pursuant to Acts of 1947, chapter 222 [6-7-1-1—6-7-1-36], as last amended by Acts of 1965, chapter 225, or as later amended or superseded. The auditor of state shall pay over such money, as it becomes available for distribution, to the controller of the Authority. Provided, however, That such money allocated to cities and towns for their respective general funds is not included herein and shall continue to be distributed and paid to the cities and towns in the County as provided by said Acts of 1947, chapter 222 [6-7-1-1—6-7-1-36], as amended or superseded. Provided, further, That all funds appropriated to the capital improvement board of managers of the County by the 95th General Assembly from such cigarette tax funds shall be paid to the treasurer of the County for the use of said capital improvement board, and nothing herein shall be deemed to affect or reduce said appropriations.

"(9) The portion of the Indiana inheritance tax retained by or payable to the County. All such money shall be paid to the controller of the Authority as it becomes available for distribution.

“(10) Any and all money received by the Authority in the exercise of its powers or control and use of its property.”

Acts 1969, ch. 173, § 1403, p. 357; IC 1971, 18-4-14-3, IND. ANN. STAT., § 48-9505 (Burns, 1972), reads as follows:

“18-4-14-3 [48-9505]. Allocation of state funds to excluded cities and included towns.—This act [18-4-1-1—18-4-15-2] shall not affect or limit the right of each excluded city and included town to receive the same allocations of moneys collected by the state of Indiana as are allocated to the same under other applicable law, including allocation from the motor vehicle highway account fund with respect to roads which the same maintain and allocations from the cigarette tax fund and alcoholic beverage fee and tax allocations as provided by applicable law.”

APPENDIX D

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE SUPERIOR COURT OF MARION COUNTY
CAUSE NO. S471 1332 ROOM NO. 4

CITY OF LAWRENCE, INDIANA,)
)
) Plaintiff,)
)
) vs.)
)
CITY OF INDIANAPOLIS, INDIANA;)
MARY D. AIKINS, Auditor of the)
State of Indiana; and)
LAWRENCE L. BUELL, Treasurer of)
Marion County, Indiana, for and)
on behalf of the Department of)
Transportation of Consolidated)
First Class City of Indianapolis,)
Indiana,)
) Defendants.)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Comes now City of Lawrence, Indiana, “Plaintiff”, and City of Indianapolis, Indiana, Mary D. Aikins, and Lawrence L. Buell, Defendants, and the cause being at issue on Plaintiff’s Complaint and Defendants’ Answers filed herein, which Complaint and Answers read as follows:

(H.I.)

And Plaintiff having filed herein its Motion For Summary Judgment, supported by "Certification of Auditor of State" and "Additional Certification of Auditor of State", which Motion and Certifications read as follows:

(H.I.)

And Defendants City of Indianapolis and Lawrence L. Buell having filed herein Affidavits of Defendant Buell and Fred L. Armstrong, Certified Copies of Bills, and the printed and bound 1967 Indiana Senate Journal and 1967 Indiana House Journal, all in opposition to Plaintiff's Motion for Summary Judgment, which Affidavits, Certified Copies, and Journals read as follows:

(H.I.)

and Defendants City of Indianapolis and Buell having moved orally for summary judgment in favor of all Defendants pursuant to Trial Rule 56 (b) and offered such Affidavits, Certified Copies, and Journals in support of such Motion,

And the Court having set and held a hearing on Plaintiff's and Defendants' Motions for Summary Judgment and having considered such Complaint and Answers, Certifications of Auditor of State, Affidavits, Certified Copies of Bills, Journals, and the applicable decisions and statutes, now finds that:

Findings of Fact

1. The 1967 General Assembly enacted the Mass Transportation Authority Act (IC 19-5-3-1, *et seq.* Burns Ind. Stat. Anno. 36-3431 *et seq.*) Section 10 (8) of such Act (IC 19-5-3-18(8) Burns Ind. Stat. Anno. 36-3449 (8))

directs Defendant Auditor to distribute to the Mass Transportation Authority of the City of Indianapolis all cigarette taxes as were previously distributable to Plaintiff's cumulative capital improvement fund.

2. Section 20 (10) of House 8111 1195 as introduced in the 1967 Indiana General Assembly required eighty per cent (80%) of such cigarette taxes to be distributed to the Mass Transportation Authority and the balance to Plaintiff's cumulative capital improvements fund. Such Bill was amended by the House to require all of such cigarette taxes to be distributed to such fund. The 1967 Senate rejected such amendment, as did the Senate-House Conference Committee. Such Bill, as enacted, requires the distribution described in paragraph 1.

3. After the enactment of the Mass Transportation Authority Act, Defendant Auditor of the State of Indiana set off on its books the following amounts under Plaintiff's name:

(a) June, 1967, distribution	\$ 9,971.58
(b) December, 1967, distribution	20,724.70
(c) June, 1968, distribution	19,268.58
(d) December, 1968, distribution	20,217.73
(e) June, 1969, distribution	16,162.90
(f) December, 1969, distribution	23,751.16
(g) June, 1970, distribution	19,406.25
(h) December, 1970, distribution	21,965.26
(i) June, 1971, distribution	20,692.96
(j) December, 1971, distribution	61,165.18
(k) June, 1972, distribution	41,951.78

4. From June, 1967, through December 1969, Defendant Auditor made distributions of the above amounts to the Mass Transportation Authority of the City of Indianapolis,

instead of making them to the Plaintiff's Cumulative Capital Improvement Fund.

5. From June, 1970, through June, 1972, Defendant Auditor made distributions of the above amounts to the Marion County Treasurer for the use of the Department of Transportation of the City of Indianapolis, instead of making them to the Plaintiff's Cumulative Capital Improvement Fund.

6. Neither the Treasurer of Marion County nor the Controller of the City of Indianapolis receives from Defendant Auditor an analysis of cigarette tax funds distributed to them.

7. The Indiana General Assembly in 1967 enacted Ch. 296, Sec. 1, page 966, the same being the last two paragraphs of Ind. Anno. Stat. Section 64-2928 (d), Burns 1971 (IC 6-7-1-32).

8. The 1967 General Assembly intended the 1967 amendment to the Cigarette Tax Act as contained in IC 6-7-1-32 (*Burns Ind. Stat. Anno. 64-2928(d)*) to apply only to such section and did not intend for it to limit or modify the cigarette tax distributions to the Mass Transportation Authority required by the Mass Transportation Act (IC 19-5-3-18(8), *Burns Ind. Stat. Anno. 36-3449(8)*).

9. The intent of the 1967 General Assembly was that cigarette taxes previously distributed to Plaintiff's cumulative capital improvement fund should thereafter be distributed to the Mass Transportation Authority of the City of Indianapolis.

10. The 1967 amendments to the Cigarette Tax Act and the Mass Transportation Act, when viewed together, are consistent and are not ambiguous nor in conflict with each other.

11. The 1969 Consolidated First Class Cities Act (IC 18-4-1-1, *et. seq. Burns Ind. Stat. Anno. 48-9101 et seq.*) transferred such cigarette taxes to the Department of Transportation of the City of Indianapolis. IC 18-4-14-3 (*Burns Ind. Stat. Anno. 48-9505*) was not intended to return such taxes to Plaintiff.

12. There is no genuine issue as to a material fact.

Conclusions of Law

1. The 1967 amendment to the Cigarette Tax Act and the Mass Transportation Act are consistent and not ambiguous nor in conflict with each other.

2. The intent of the 1967 General Assembly was that cigarette taxes previously distributed to Plaintiff's cumulative capital improvement fund should thereafter be distributed to the Mass Transportation Authority of the City of Indianapolis.

3. The 1969 Consolidated First Class Cities Act (IC 18-4-1-1, *et seq. Burns Ind. Stat. Anno. 48-9101 et seq.*), transferred such cigarette taxes to the Department of Transportation of the City of Indianapolis. IC 18-4-14-3 (*Burns Ind. Stat. Anno. 48-9505*) was not intended to return such taxes to Plaintiff.

4. The cigarette taxes distributable to Plaintiff's cumulative capital improvement fund prior to the enactment of the 1967 Mass Transportation Act should have, after the effective date of such Act, been distributed to the Mass Transportation Authority of the City of Indianapolis or to the Treasurer of Marion County for the use of the Department of Transportation of the City of Indianapolis. All distributions so made by Defendant Auditor are proper and in accordance with the laws of the State of Indiana.

5. The distribution of cigarette taxes to the Mass Transportation Authority or the Treasurer of Marion County required by the 1967 Mass Transportation Act is constitutional.

6. The law is with Defendants.

7. Defendants City of Indianapolis, Lawrence L. Buell, and Mary D. Aikins are entitled as a matter of law to summary judgment in their favor on all issues of fact or law raised by Plaintiff's Complaint.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that :

1. The Court finds the facts in favor of Defendants.

2. The law is with Defendants.

3. Judgment is hereby granted in favor of Defendants City of Indianapolis, Lawrence L. Buell, and Mary D. Aikins on their Answers, and the defendants' City of Indianapolis and Buell's Motion for Summary Judgment and against Plaintiff City of Lawrence on its Complaint and Motion for Summary Judgment.

4. All cigarette tax funds distributable to the cumulative capital building fund of Plaintiff City of Lawrence prior to the enactment of the 1967 Mass Transportation Act which have subsequently been distributed by Defendant Mary D. Aikins, Auditor, or her predecessors in office, to the Mass Transportation Authority of the City of Indianapolis or the Treasurer of Marion County for the use of the Department of Transportation of the City of Indianapolis have been distributed in accordance with the laws of the State of Indiana.

5. Plaintiff City of Lawrence shall take nothing by way of its complaint filed herein.

/s/ Frank R. Symmes, Jr.

JUDGE, Superior Court of
Marion County, Room No. 4

Dated :

July 26, 1972

CITY-COUNTY LEGAL DEPARTMENT
2560 City-County Building
Indianapolis, Indiana 46204
633-3360

20
Jan 76
Chief Judge

APPENDIX E
IN THE
COURT OF APPEALS OF INDIANA
SECOND DISTRICT



NO. 2-174 A 27

CITY OF LAWRENCE, INDIANA,

Appellant,

v.

CITY OF INDIANAPOLIS, INDIANA;
MARY D. AIKINS, Auditor of the
State of Indiana; and LAWRENCE L.
BUELL, Treasurer of Marion County,
Indiana, for and on behalf of the
Department of Transportation of
Consolidated First Class City of
Indianapolis, Indiana,

Appellees.

Appeal from the Marion
County Superior Court,
Room No. 4

The Honorable
Frank A. Symmes, Jr.,
Judge

PETITION FOR REHEARING

The appellant petitions the Court to grant a rehearing in the above entitled cause.

The appellant respectfully represents that the Court erred in its opinion and decision in the following respects:

(1) This Court erroneously decided a new question in this: the transcript and assignment of errors present a new question of law which is also presented by the briefs of appellant, to-wit: Whether all the cigarette tax funds distributable to the cumulative capital improvement building fund of Lawrence prior to the enactment of the 1967 Mass Transportation Act which were subsequently distributed by defendant, Mary D. Aikins, Auditor, or her predecessors in office, to the Mass

APPENDIX F

Appellant's "Petition to Transfer" is hereby DENIED this 21st day of June, 1976.

All Justices concur.

Richard M. Givan
RICHARD M. GIVAN IN THE
CHIEF JUSTICE

SUPREME COURT OF INDIANA

NO. 2-174A27



CITY OF LAWRENCE, INDIANA,

Appellant (Plaintiff Below),

vs.

CITY OF INDIANAPOLIS, INDIANA;
MARY D. AIKINS, Auditor of the
State of Indiana; and LAWRENCE L.
BUELL, Treasurer of Marion County,
Indiana, for and on behalf of the
Department of Transportation of
Consolidated First Class City of
Indianapolis, Indiana,

Appellees (Defendants Below).

) Appeal from the Marion
) County Superior Court,
) Room No. 4

) The Honorable

) Frank A. Symmes, Jr.,
) Judge

PETITION TO TRANSFER

The appellant in the above entitled cause respectfully shows to the Court that:

(1) The judgment of the Marion Superior Court was affirmed by the Second District of the Court of Appeals of Indiana on the 20th day of December, 1975, and that the Court of Appeals decided the case with a written opinion filed on said date.

(2) That the decision of the Court of Appeals was against the appellant, this petitioner.

(3) That this petitioner filed its application for a rehearing with the Clerk of this Court on the 7th day of January, 1976, which date is within twenty days from the rendition of said decision.

(4) That said petition for rehearing was denied by the Court of Appeals on the 20th day of January, 1976,

APPENDIX G

IN THE
Supreme Court of Indiana

NO. 972-S-128

CITY OF LAWRENCE, INDIANA,)
)
Appellant,)
)
vs.)
)
CITY OF INDIANAPOLIS, INDIANA;)
MARY D. AIKINS, Auditor of the)
State of Indiana; and LAWRENCE L.)
BUELL, Treasurer of Marion County,)
Indiana, for and on behalf of the)
Department of Transportation of)
Consolidated First Class City of)
Indianapolis, Indiana,)
Appellees.)

**NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES**

Notice is hereby given that the City of Lawrence, Indiana, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Indiana entered in this action on June 21, 1976, denying the appellant's

petition to transfer from the decision of the Court of Appeals denying its petition for rehearing on January 20, 1976, on the judgment the Court of Appeals of Indiana, Second District, entered December 18, 1975, affirming the judgment of the Trial Court against the appellant on July 26, 1972.

This appeal is taken pursuant to 28 U.S.C., § 1257(2).

/s/ William D. Hall

William D. Hall
Attorney for Appellant

William D. Hall
Attorney for Appellant
315 Circle Tower
Indianapolis, Indiana 46204
639-6306

NOV 2 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1976

No. 76-401

CITY OF LAWRENCE, INDIANA, Appellant,

v.

CITY OF INDIANAPOLIS, INDIANA, MARY D.
AIKINS, Auditor of the State of Indiana; and
LAWRENCE L. BUELL, Treasurer of Marion County,
Indiana, for and on behalf of the Department
of Transportation of Consolidated First Class
City of Indianapolis, Indiana, Appellees.

**ON APPEAL FROM THE SUPREME COURT OF
INDIANA**

MOTION TO DISMISS OR AFFIRM

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IN THE Supreme Court of the United States

October Term, 1976

No. 76-401

CITY OF LAWRENCE, INDIANA, Appellant,

v.

CITY OF INDIANAPOLIS, INDIANA, MARY D.
AIKINS, Auditor of the State of Indiana; and
LAWRENCE L. BUELL, Treasurer of Marion County,
Indiana, for and on behalf of the Department
of Transportation of Consolidated First Class
City of Indianapolis, Indiana, Appellees.

**ON APPEAL FROM THE SUPREME COURT OF
INDIANA**

MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein and/or affirm the judgment of the Court of Appeals of Indiana, on the grounds that this appeal does not present a substantial Federal question, in that the enactment of said statute and its application in this case is not repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, nor have any other Federal rights been denied the Appellant.

I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

The appropriate text of the statutes involved in this appeal are set out verbatim herein, marked as Appendix C. They are: Acts 1967, Chapter 296, § 1, p. 966; IC 1971, 6-7-1-32; IND. ANN. STAT., § 64-2928d (Burns, 1972); Acts 1967, Chapter 311, § 19, p. 1195; IC 1971, 19-5-3-18; IND. ANN. STAT., § 36-3449(a) (Burns, 1972); and Acts 1969, Chapter 173, § 1403, p. 357; IC 1971, 18-4-14-3; IND. ANN. STAT., § 48-9505 (Burns, 1972).

B. The Proceedings Below

Appellant filed its complaint to recover \$275,278.08, plus interest, which is set off on the State Auditor's official records as Appellant's distributive share of cigarette tax money for its cumulative capital improvement fund. The State Auditor paid Appellant its distributive share in December, 1965 and June, and December, 1966. Beginning with the distribution in June of 1967 through December of 1969, said Appellee-Auditor paid Appellant's distributive share to the Mass Transportation Authority of Greater Indianapolis, and from June, 1970, through June of 1972, said Auditor paid Appellant's distributive share to the Marion County, Indiana, Treasurer for the use of the Department of Transportation of the City of Indianapolis. The cause was placed at issue by the respective answers of the Appellees.

Thereafter, Appellant duly filed its motion for summary judgment, along with certifications of the Auditor of the State of Indiana, showing the amount of Appellant's distri-

butions and to whom and when they were paid, and a memorandum supporting said motion for summary judgment. Counter-affidavits of the Appellees, their opposing brief, certified copies of bills and journal entries, were filed in opposition to said motion for summary judgment. Appellant then filed its reply brief.

On July 26, 1972, the trial court entered its Findings of Fact, Conclusions of Law and Judgment, which were in favor of the Appellees on their answers and the Appellees' oral motion for summary judgment, and against the Appellant, on its complaint and written motion for summary judgment. A verbatim statement of said Findings of Fact, Conclusions of Law, and Judgment thereon, omitting the caption, is appended herein as Appendix A.

On July 31, 1972, Appellant filed its motion to correct errors and brief supporting motion to correct errors. This motion to correct errors was overruled on July 31, 1972. The judgment of the trial court was affirmed by the Court of Appeals, State of Indiana, Second District, on December 18, 1975. A copy of the opinion is appended hereto as Appendix B.

Thereafter, Appellant's Petition for Rehearing was denied by the Court of Appeals, Second District, State of Indiana, on January 20, 1976. Thereafter, Appellant's Petition for Transfer to the Indiana State Supreme Court was denied on June 21, 1976, with notice of this appeal being filed with the Clerk of the Supreme Court of Indiana on September 3, 1976.

II.

ARGUMENT

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The Appellant herein attempts to have this Court review the decision by appeal under Title 28, United States Code, Section 1257(2). Specifically, the Appellant herein alleges that the enactment of the statute involved and its application is repugnant to the provisions of the 14th Amendment to the Constitution of the United States.

Initially, it should be pointed out that the Appellant herein has no vested right in the cigarette tax fund, and the General Assembly may constitutionally reallocate this fund at any time. The Appellant attempts to argue that a re-allocation by legislative action of the Cigarette Tax Fund is arbitrary and unreasonable. The Indiana decisions are completely against the Appellant on these points. In *State ex rel. Mass Transportation Authority of Greater Indianapolis v. Indiana Revenue Board, et al.*, 1968, 144 Ind. App. 63, 242 N.E.2d 642, Rehearing Denied, with Opinion, 253 N.E.2d 725, the court stated the rule as follows:

"In *County Department of Public Welfare v. Pott-hoff*, 220 Ind. 574, at page 582 . . . our Supreme Court stated that:

' . . . counties are political subdivisions of the state and that as such they have no vested or contractual rights in the disposition of funds derived from general taxation therein which are superior to the

public policy of the state as declared by the legislature.' "

Cities, such as the Appellant herein, also being political subdivisions of the state, have no vested or contractual rights as set out in *County Department of Public Welfare, supra*.

A similar holding has been made by the Supreme Court of the United States regarding constitutional protection and rights of a city. In *Williams v. Mayor and City Council of Baltimore* (1932) 289 U.S. 36, 77 L. Ed. 1015, 53 S. Ct. 431, the City of Baltimore argued that a Maryland statute denied the city equal protection under the Fourteenth Amendment. The Fourth Circuit agreed. This Supreme Court reversed the Fourth Circuit and held that a city had no rights under the Fourteenth Amendment. Justice Cardozo stated the rule very explicitly:

"A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal constitution which it may invoke in opposition to the will of its creator." 77 L.Ed.1015, at 1020.

Also, *Trenton v. New Jersey*, 262 U.S. 182, 67 L. Ed. 937, 43 S. Ct. 534, and *Newark v. New Jersey*, 262 U.S. 192, 67 L. Ed. 943, 43 S. Ct. 539.

It has been recognized throughout the history of our legal system that there is a substantial distinction between the constitutional rights of private and public entities.

In *Dartmouth College v. Woodward*, (1819) 4 Wheat. 518, the Supreme Court discussed the constitutional rights of political subdivisions, vis-a-vis actions of their political superior, the state itself. The Court explained that since political subdivisions, such as cities, towns and municipi-

palities, are but creatures of the state, they have no rights independent of those expressly provided by the state. Such political subdivisions, therefore, can assert no "constitutional rights" in opposition to the actions of the state. 4 Wheat. at 661.

This principle has been reaffirmed and expanded in substantial numbers of cases. *Newark, supra*, *Trenton, supra*, and *Worcester v. Worcester Consol. St. Ry.* (1905) 196 U.S. 539, 25 S. Ct. 327, 49 L. Ed. 591.

In *Trenton, supra*, the Court stated the doctrine thusly:

"A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state, exercising and holding powers and privileges subject to the sovereign will." *Barnes v. District of Columbia*, 91 U.S. 540, 544, 545, 23 L. Ed. 440.

It has further been held, "The power of the state, unrestrained by the contract clause of the 14th Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned." *Trenton, supra*, 262 U.S. at 187-188, 43 S. Ct. at 1537.

Therefore, the Appellant is not a "person" as stated in the Fourteenth Amendment to the Constitution of the United States. Accordingly, there is no Federal question for this Court to take jurisdiction and review the decision which is appealed herein.

III.

CONCLUSION AND PRAYER FOR RELIEF

There is no substantial Federal question presented by this appeal, and neither is the Appellant afforded any protection under the Fourteenth Amendment to the Constitution of the United States, nor have any other Federal rights been denied the Appellant herein.

WHEREFORE, Appellees pray that this appeal be dismissed, or in the alternative, reaffirm the judgment entered below, and for all other proper relief.

Respectfully submitted,

DAVID R. FRICK

WILLIAM L. SOARDS

Counsel for Appellees

APPENDIX

APPENDIX A

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE SUPERIOR COURT OF MARION COUNTY
CAUSE NO. S471 1332 ROOM NO. 4

CITY OF LAWRENCE, INDIANA,)
)
) Plaintiff,)
)
) vs.)
)
CITY OF INDIANAPOLIS, INDIANA;)
MARY D. AIKINS, Auditor of the)
State of Indiana; and)
LAWRENCE L. BUELL, Treasurer of)
Marion County, Indiana, for and)
on behalf of the Department of)
Transportation of Consolidated)
First Class City of Indianapolis,)
Indiana,)
) Defendants.)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND JUDGMENT**

Comes now City of Lawrence, Indiana, "Plaintiff", and
City of Indianapolis, Indiana, Mary D. Aikins, and
Lawrence L. Buell, Defendants, and the cause being at
issue on Plaintiff's Complaint and Defendants' Answers
filed herein, which Complaint and Answers read as follows:

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(H.I.)

And Plaintiff having filed herein its Motion For Summary Judgment, supported by "Certification of Auditor of State" and "Additional Certification of Auditor of State", which Motion and Certifications read as follows:

(H.I.)

And Defendants City of Indianapolis and Lawrence L. Buell having filed herein Affidavits of Defendant Buell and Fred L. Armstrong, Certified Copies of Bills, and the printed and bound 1967 Indiana Senate Journal and 1967 Indiana House Journal, all in opposition to Plaintiff's Motion for Summary Judgment, which Affidavits, Certified Copies, and Journals read as follows:

(H.I.)

and Defendants City of Indianapolis and Buell having moved orally for summary judgment in favor of all Defendants pursuant to Trial Rule 56 (b) and offered such Affidavits, Certified Copies, and Journals in support of such Motion,

And the Court having set and held a hearing on Plaintiff's and Defendants' Motions for Summary Judgment and having considered such Complaint and Answers, Certifications of Auditor of State, Affidavits, Certified Copies of Bills, Journals, and the applicable decisions and statutes, now finds that:

Findings of Fact

1. The 1967 General Assembly enacted the Mass Transportation Authority Act (IC 19-5-3-1, *et seq.* Burns Ind. Stat. Anno. 36-3431 *et seq.*) Section 10 (8) of such Act (IC 19-5-3-18(8) Burns Ind. Stat. Anno. 36-3449 (8))

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directs Defendant Auditor to distribute to the Mass Transportation Authority of the City of Indianapolis all cigarette taxes as were previously distributable to Plaintiff's cumulative capital improvement fund.

2. Section 20 (10) of House 8111 1195 as introduced in the 1967 Indiana General Assembly required eighty per cent (80%) of such cigarette taxes to be distributed to the Mass Transportation Authority and the balance to Plaintiff's cumulative capital improvements fund. Such Bill was amended by the House to require all of such cigarette taxes to be distributed to such fund. The 1967 Senate rejected such amendment, as did the Senate-House Conference Committee. Such Bill, as enacted, requires the distribution described in paragraph 1.

3. After the enactment of the Mass Transportation Authority Act, Defendant Auditor of the State of Indiana set off on its books the following amounts under Plaintiff's name:

(a) June, 1967, distribution	\$ 9,971.58
(b) December, 1967, distribution	20,724.70
(c) June, 1968, distribution	19,268.58
(d) December, 1968, distribution	20,217.73
(e) June, 1969, distribution	16,162.90
(f) December, 1969, distribution	23,751.16
(g) June, 1970, distribution	19,406.25
(h) December, 1970, distribution	21,965.26
(i) June, 1971, distribution	20,692.96
(j) December, 1971, distribution	61,165.18
(k) June, 1972, distribution	41,951.78

4. From June, 1967, through December 1969, Defendant Auditor made distributions of the above amounts to the Mass Transportation Authority of the City of Indianapolis,

instead of making them to the Plaintiff's Cumulative Capital Improvement Fund.

5. From June, 1970, through June, 1972, Defendant Auditor made distributions of the above amounts to the Marion County Treasurer for the use of the Department of Transportation of the City of Indianapolis, instead of making them to the Plaintiff's Cumulative Capital Improvement Fund.

6. Neither the Treasurer of Marion County nor the Controller of the City of Indianapolis receives from Defendant Auditor an analysis of cigarette tax funds distributed to them.

7. The Indiana General Assembly in 1967 enacted Ch. 296, Sec. 1, page 966, the same being the last two paragraphs of Ind. Anno. Stat. Section 64-2928 (d), Burns 1971 (IC 6-7-1-32).

8. The 1967 General Assembly intended the 1967 amendment to the Cigarette Tax Act as contained in IC 6-7-1-32 (*Burns Ind. Stat. Anno. 64-2928(d)*) to apply only to such section and did not intend for it to limit or modify the cigarette tax distributions to the Mass Transportation Authority required by the Mass Transportation Act (IC 19-5-3-18(8), *Burns Ind. Stat. Anno. 36-3449(8)*).

9. The intent of the 1967 General Assembly was that cigarette taxes previously distributed to Plaintiff's cumulative capital improvement fund should thereafter be distributed to the Mass Transportation Authority of the City of Indianapolis.

10. The 1967 amendments to the Cigarette Tax Act and the Mass Transportation Act, when viewed together, are consistent and are not ambiguous nor in conflict with each other.

11. The 1969 Consolidated First Class Cities Act (IC 18-4-1-1, *et. seq. Burns Ind. Stat. Anno. 48-9101 et seq.*) transferred such cigarette taxes to the Department of Transportation of the City of Indianapolis. IC 18-4-14-3 (*Burns Ind. Stat. Anno. 48-9505*) was not intended to return such taxes to Plaintiff.

12. There is no genuine issue as to a material fact.

Conclusions of Law

1. The 1967 amendment to the Cigarette Tax Act and the Mass Transportation Act are consistent and not ambiguous nor in conflict with each other.

2. The intent of the 1967 General Assembly was that cigarette taxes previously distributed to Plaintiff's cumulative capital improvement fund should thereafter be distributed to the Mass Transportation Authority of the City of Indianapolis.

3. The 1969 Consolidated First Class Cities Act (IC 18-4-1-1, *et seq. Burns Ind. Stat. Anno. 48-9101 et seq.*), transferred such cigarette taxes to the Department of Transportation of the City of Indianapolis. IC 18-4-14-3 (*Burns Ind. Stat. Anno. 48-9505*) was not intended to return such taxes to Plaintiff.

4. The cigarette taxes distributable to Plaintiff's cumulative capital improvement fund prior to the enactment of the 1967 Mass Transportation Act should have, after the effective date of such Act, been distributed to the Mass Transportation Authority of the City of Indianapolis or to the Treasurer of Marion County for the use of the Department of Transportation of the City of Indianapolis. All distributions so made by Defendant Auditor are proper and in accordance with the laws of the State of Indiana.

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5. The distribution of cigarette taxes to the Mass Transportation Authority or the Treasurer of Marion County required by the 1967 Mass Transportation Act is constitutional.

6. The law is with Defendants.

7. Defendants City of Indianapolis, Lawrence L. Buell, and Mary D. Aikins are entitled as a matter of law to summary judgment in their favor on all issues of fact or law raised by Plaintiff's Complaint.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that:

1. The Court finds the facts in favor of Defendants.

2. The law is with Defendants.

3. Judgment is hereby granted in favor of Defendants City of Indianapolis, Lawrence L. Buell, and Mary D. Aikins on their Answers, and the defendants' City of Indianapolis and Buell's Motion for Summary Judgment and against Plaintiff City of Lawrence on its Complaint and Motion for Summary Judgment.

4. All cigarette tax funds distributable to the cumulative capital building fund of Plaintiff City of Lawrence prior to the enactment of the 1967 Mass Transportation Act which have subsequently been distributed by Defendant Mary D. Aikins, Auditor, or her predecessors in office, to the Mass Transportation Authority of the City of Indianapolis or the Treasurer of Marion County for the use of the Department of Transportation of the City of Indianapolis have been distributed in accordance with the laws of the State of Indiana.

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5. Plaintiff City of Lawrence shall take nothing by way of its complaint filed herein.

/s/ Frank R. Symmes, Jr.

JUDGE, Superior Court of
Marion County, Room No. 4

Dated:

July 26, 1972

CITY-COUNTY LEGAL DEPARTMENT
2560 City-County Building
Indianapolis, Indiana 46204
633-3360

APPENDIX B

ATTORNEY FOR
APPELLANT:
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anapolis, Indiana and
Lawrence L. Buell, Treasurer
of Marion County.

IN THE

Court of Appeals of Indiana

SECOND DISTRICT

CITY OF LAWRENCE, INDIANA,)
Appellant,)
v.)
CITY OF INDIANAPOLIS,)
INDIANA;)
MARY D. AIKINS, Auditor of the)
State of Indiana; and LAWRENCE L.)
BUELL, Treasurer of Marion County,)
Indiana, for and on behalf of the)
Department of Transportation of)
Consolidated First Class City of)
Indianapolis, Indiana,)
Appellees.)

NO. 2-174 A 27

APPEAL FROM THE SUPERIOR COURT OF MARION
COUNTY, ROOM NO. 4

The Honorable Frank A. Symmes, Jr., Judge

WHITE, J.

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The appellant City of Lawrence (Lawrence), a third class city located in Marion County, instituted this action by filing its complaint alleging that since 1967 it had not received its proper share of distributions made from the cigarette tax fund, that a portion of said proper share had been wrongfully paid by the Auditor of State first to the Mass Transportation Authority of Greater Indianapolis and subsequently to the Department of Transportation of the Consolidated City of Indianapolis, and that the recipients of said funds have been and are wrongfully withholding said funds from Lawrence. The complaint sought to have the funds alleged to have been improperly distributed declared the property of Lawrence, that the holders of said funds be ordered to turn said funds and interest thereon over to Lawrence, and that the Auditor of State be ordered to make future distributions of cigarette tax funds in accord with law.

The trial court entered summary judgment in favor of the defendants and Lawrence has appealed that judgment.

We affirm.

The two questions presented by Lawrence's complaint are straightforward questions of statutory construction which are buried in prolix pleadings. The first question involves two enactments of the 1967 Regular Session of the General Assembly, chapter 296, which amended the cigarette tax act, and chapter 311, which created a Mass Transportation Authority in Marion County.¹ The question is: In view of the aforementioned enactments, is it Lawrence or is it the Mass Transportation Authority that is the proper recipient of certain moneys distributed from

¹ Both Acts were approved on March 11, 1965[7]. Chapter 296, amending the cigarette tax act, declared an emergency and became effective July 1, 1965[7]; Chapter 311, creating the Mass Transportation Agency, declared an emergency and became effective upon passage.

the cigarette tax fund? The second question involves the effect of Acts of 1969, chapter 173 (Uni-Gov), on the distribution of the same moneys. The question is: Is it Lawrence or is it the Department of Transportation of the Consolidated City of Greater Indianapolis (which assumed the duties of the Mass Transportation Authority) that is the proper recipient of certain moneys distributed from the cigarette tax fund?

I.

The cigarette tax act (Acts of 1947, ch. 222) levies a tax on the sale of cigarettes and has evolved by amendment from a simple source of money for the State's general fund into a source of money to be distributed in a somewhat complex pattern to the State general fund, to various specified state agencies, and to local municipal corporations for specified purposes. We need not delve into the development of the pattern of distribution of the fund, nor even describe that pattern in detail. It is sufficient to note that prior to the effective date of the 1967 Acts in question, the cigarette tax act, as then last amended by Acts of 1965, ch. 225, created a cigarette tax fund and, in three separate sections, appropriated portions of that fund to the cities and towns in Indiana. Section 27b appropriated a portion of the cigarette tax fund to the general funds of cities and towns; Sections 27c and 27d each appropriated a portion of the cigarette tax fund to the cumulative capital improvement funds of the cities and towns. In all three instances the appropriation was to be allocated among and distributed to the cities and towns in proportion to their populations.

The 1967 amendment of the cigarette tax act, Acts of 1967, ch. 296 (hereinafter called the "Tax Amendment"), did not change the basic distribution of the cigarette tax

fund, but it did add special provisions concerning the distribution to be made to the Cumulative Capital Improvement Fund of Indianapolis.

Section 27d was amended by adding to it the following language:

"Except, that, on and after July 1, 1967, the sum of Three Hundred Fifty Thousand Dollars out of the appropriation theretofore made for distribution to the Cumulative Capital Improvement Fund of cities of the first class pursuant to this section is hereby appropriated to the Capital Improvement Board of Managers of the county created by Chapter 326 of the Acts of the Indiana General Assembly of 1965 to be used for the payment of principal and interest on any bonds issued or to be issued pursuant to the authority of said Chapter 326 of the Acts of 1965 or any acts amendatory or supplemental thereto. Said sum shall be distributed semi-annually on the first day of June and December in each year and paid to the treasurer of such County upon warrants issued by the Auditor of State. The County Treasurer shall deposit all amounts received pursuant to this section in the Capital Improvement Bond Fund created by Section 13 of said Chapter 326 of the Acts of 1965. It is the intent of the General Assembly that said appropriation to such board of Managers shall be deducted from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated for distribution to the Cumulative Capital Improvement Fund of other cities and towns of the state.

"Provided further, that the remaining funds available for distribution to the Capital Improvement Fund of cities of the first class pursuant to this Act is hereby appropriated to the Metropolitan Thoroughfare Authority created pursuant to Acts 1963, ch. 386, or to any thoroughfare or transportation Authority subsequently created in a city of the first class for use

by such Authority. Said funds shall be distributed semi-annually on the first day of June and December each year and paid to the treasurer of the county in which such Authority is situated upon warrants issued by the Auditor of State. The county treasurer shall accept said funds pursuant to said Act and the custody of such funds shall be governed by the provisions of said Act. It is the intent of the General Assembly that said appropriation to such Authority shall be appropriated from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated to the Cumulative Capital Improvement Fund of other cities and towns of the State.

Section 27c was also amended to provide in pertinent part:

"(c) . . . provided, that all sums to be distributed in accordance with this subsection to Cumulative Capital Improvement Funds in cities of the first class is hereby appropriated to the Metropolitan Thoroughfare Authority created pursuant to Acts 1963, ch. 386 or to any thoroughfare or transportation authority subsequently created in a city of the first class, for use by any such Authority said funds shall be distributed semi-annually on the first day of June and December each year and paid to the treasurer of the county in which such Authority is situated upon warrants issued by the Auditor of State. The county treasurer shall accept said funds pursuant to said Act and the custody of such funds shall be governed by the provisions of said Act.

"It is the intent of the General Assembly that said appropriation to such Authority shall be appropriated from the distributive shares of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated to the Cumulative Capital Improvement Fund of other cities and towns of the State . . ."

Thus the Tax Amendment appropriated to the Capital Improvement Board of Managers of Marion County and to the Metropolitan Thoroughfare Authority of Marion County, two county-wide agencies, all the cigarette tax fund moneys that would otherwise be distributed to the cumulative capital improvement fund of Indianapolis. The Tax Amendment also repetitiously specified that it, the Tax Amendment, was not to adversely affect the distribution of cigarette tax funds to the cumulative capital improvement fund of any other city or town, including, though not specifying, Lawrence.

The 95th General Assembly subsequently enacted Acts of 1967, chapter 311 (hereinafter called the "MTA Act"), which created the Mass Transportation Authority of Marion County, a distinct municipal corporation with boundaries coterminous with the boundaries of Marion County.

This new municipal corporation was the successor to the Metropolitan Thoroughfare Authority referred to in the Tax Amendment, a fact clearly shown by the pertinent part of Section 3 of the MTA ACT:

"(14) Upon the effective date of the enactment of this act, the [Mass Transportation] Authority shall succeed to and assume all of the powers, property, obligations and duties of the Metropolitan Thoroughfare Authority of the County authorized by Acts 1963, c. 386. The board of directors created pursuant to that act shall serve as directors of the [Mass Transportation] Authority until their successors have been appointed and qualified as provided in this act."

It is thus clear that even if the MTA Act had no provisions whatever for the funding of the Mass Transportation Authority, that agency, as the successor of the Metropolitan Thoroughfare Authority, would be entitled to the funds allocated to the Thoroughfare Authority by the Tax

Amendment (i.e., the portion that would otherwise be allocated to Indianapolis' capital improvement fund less \$350,000.00 appropriated to the Capital Improvement Board). It is, of course, equally clear that absent any special funding provisions in the MTA Act the allocation and distribution of cigarette tax funds to the cumulative capital improvement funds of other cities and towns in Marion County, including Lawrence, would be unaffected by the passage of that MTA Act.

However, the MTA Act does specifically mention the cigarette tax fund distribution. Section 19 of the MTA Act concerns the financing of the newly created municipal corporation and provides in pertinent part:

"Financing. (a) In order to provide funds for carrying out the duties, powers and obligations of the Authority, the Authority shall receive the following money on and after the effective date of this Act, except as provided in this section:

• • • • •

"(8) Any and all money in the Cigarette Tax Fund of the State available for distribution to the cities and towns in the County for deposit in the Cumulative Capital Improvement Funds of such cities and towns pursuant to Acts of 1947, c. 222, as last amended by Acts of 1965, c. 225, or as later amended or superseded. The Auditor of State shall pay over such money, as it becomes available for distribution, to the Controller of the Authority. Provided, however, that such money allocated to cities and towns for their respective general funds is not included herein and shall continue to be distributed and paid to the cities and towns in the County as provided by said Acts of 1947, c. 222, [§ 27b, not involved herein] as amended or superseded. Provided, further, that all funds appropriated to the Capital Improvement Board of Managers of the County by the 95th General Assembly from such cigarette tax funds shall be paid to the Treasurer of

the County for the use of said Capital Improvement Board, and nothing herein shall be deemed to affect or reduce said appropriations."

All parties agree that from the semi-annual distribution in July, 1967² to and including the distribution in December, 1969, the Auditor of State computed Lawrence's pro rata allocation of the appropriations to the cumulative capital improvement funds of cities and towns as provided in sections 27c and 27d of the cigarette tax act, but forwarded that share to the Mass Transportation Authority rather than to Lawrence.

Appellant Lawrence first argues that the intent of the 95th General Assembly in enacting the Tax Amendment and the MTA Act was to appropriate to the Mass Transportation Authority only the cigarette tax fund allocation to Indianapolis' cumulative capital improvement fund as specified in the Tax Amendment. To support this contention Lawrence recites in great detail the history of the two enactments as they progressed through the legislative process, listing amendments adopted and amendments rejected as well as specifying dates and results of votes thereon. Lawrence also points to sections 15 and 16 of the MTA Act, which sections authorize the Mass Transportation Authority to adopt a budget and to levy property taxes in the amount necessary to fully implement that budget. Lawrence argues that these sections prove that the Authority is to receive its funds from property taxes levied on all taxable property in Marion County rather than from Lawrence's rightful share of the cigarette tax fund. Lawrence concluded that the language contained in section 19(8) of the MTA Act, set out above, is not intended to be in itself an appropriation of any portion of the cigarette

² The MTA Act declared an emergency and became effective upon passage, March 11, 1967.

tax fund, but is instead intended merely to authorize the Mass Transportation Authority to receive and accept whatever moneys might be appropriated to it by the Tax Amendment.

Lawrence's arguments must fail. Section 19(8) of the MTA Act clearly and unambiguously states that the Mass Transportation Authority is to receive "Any and all money in the Cigarette Tax Fund of the State available for distribution to the cities and towns in the County for deposit in the Cumulative Capital Improvement Funds of such cities and towns..."

There is no conflict between Section 19(8) and the tax levying power granted by sections 15 and 16. Indeed, section 19 of the MTA Act specifies ten different sources of funds for the Mass Transportation Authority. The property taxes authorized by sections 15 and 16 are the second specified source, cigarette tax fund distributions are the eighth.

Nor are the Tax Amendment and the MTA Act conflicting. The Tax Amendment appropriates a certain portion of the cigarette tax fund to the Mass Transportation Authority; the MTA Act appropriates that same portion plus an additional portion. Each is a separate appropriation; neither, on its face, limits the other. Nor, apparently, was the MTA Act passed in ignorance of the Tax Amendment since it carefully and specifically preserves the appropriation to the Capital Improvement Board contained in that enactment.

Finally, the language of Section 19(8) of the MTA Act is clearly language of appropriation rather than of authorization to accept. It explicitly directs the Auditor of State to pay over the moneys specified therein to the Controller of the Authority; it impliedly authorizes the Controller

to accept those moneys, it (subsection 8) neither explicitly nor impliedly authorizes the Controller to accept any funds that might be appropriated by other legislation. Such an appropriation of cigarette tax fund moneys by an independent and basically unrelated enactment is authorized by the cigarette tax act which, in its section 27, establishes the cigarette tax fund "for the purposes for which appropriations are made by this act or other law."

As was said in *Meade Electric Co. v. Hagberg* (1959), 129 Ind. App. 631, 640, 159 N.E. 2d 408, 413:

"There are numerous cases which follow the rule that where the language or statute is clear and plain there is no room for construction, and courts have no power to supply supposed defects or omissions or to resort to construction for the purpose of limiting or extending its operation, and judicial construction is not allowable to interpret the law which is plain upon its face. *Taelman v. Bd. of Fin. of School City of South Bend* (1937), 212 Ind. 26, at page 33, 6 N.E. 2d 557, *Bd. of Election Commissioners of Gibson Co. v. State ex rel. Sides* (1897), 148 Ind. 675, at 678, 48 N.E. 226; *Poyser v. Stangland* (1952), 230 Ind. 685, 106 N.E. 2d 390."

Lawrence's second argument is that if the MTA Act be interpreted as providing that the Mass Transportation Authority receive the cigarette tax fund allocation to Lawrence's cumulative capital improvement fund, then that portion of the Act is a special and local law in violation of Article 4, Sections 22 and 23, of the Indiana Constitution, and a violation of the privileges and immunities clauses of both the Indiana and United States Constitutions.

Lawrence's constitutional arguments are somewhat interwoven but the thrust of those arguments is:

1. That so interpreted the MTA Act arbitrarily distinguishes between Lawrence and cities and towns located outside Marion County in relation to cigarette tax fund distributions;

2. That so interpreted the MTA Act takes money that should be distributed to Lawrence, and thus is the property of Lawrence, and gives that money to the City of Indianapolis.

Lawrence argues that it is a city having the same duties, functions and responsibilities as all other cities in the state and therefore has the same right as do those cities to its proper share of cigarette tax fund money. While admitting that classification is permissible in certain instances (e.g., "Plaintiff has no quarrel with the legislative determination that the City of Indianapolis was of sufficient size it would allow only that City to use its cigarette tax funds in a manner different from all other cities"), Lawrence maintains that the classification must be reasonable and that, unlike Indianapolis, Lawrence possesses no special characteristic that would justify treating it differently from other cities in relation to cigarette tax funds. Lawrence's argument would be feasible if the classification in relation to cigarette tax funds were made by the Tax Amendment and if the classification singled out Lawrence by some arbitrary standard (i.e., cities located next to an Army base in the northeast corner of a county containing a city of the first class). However, the classification is made by the MTA Act, an act applying to "counties in which a city of the first class is situate", and applying equally to all cities and towns located in counties within that classification. Lawrence does not question the validity of the legislative determination that counties in which a city of the first class is situate have transportation problems sufficiently complex to create a special authority in

such counties, nor does Lawrence claim any difference in treatment between it and all other cities and towns in such counties.

Lawrence's argument that its moneys were given to the City of Indianapolis appears to be derived from a misunderstanding of the MTA Act. Although the entity created therein is styled "Mass Transportation Authority of Greater Indianapolis", it was not intended to be an agency or division of the City of Indianapolis. It was, instead, created as a separate and distinct municipal corporation with boundaries coterminous with the boundaries of Marion County (§ 2), boundaries that include both the City of Indianapolis and the City of Lawrence. As originally established the Board of Directors of the Authority consisted of six appointed members, half of whom were to be appointed by county boards: two by the county commissioners, one by the county council (§ 4). Acts of 1969, ch. 235, § 3, amended the MTA Act to create a five member board of directors, three of whom were to be appointed by the county council.³ The Authority's jurisdiction, duties and responsibilities were to be exercised throughout the county (§ 3).

Under no reasonable interpretation of the MTA Act could it be said that those funds given to the Authority were funds given to Indianapolis. In beneficial effect they were given to all of Marion County, including Lawrence. That being true, were we to interpret the legislation involved herein as Lawrence desires the net result would be to transfer a part of Indianapolis' share of the cigarette tax fund to the Mass Transportation Authority for the benefit of Lawrence and the other cities and towns in

³ This amendment was in practical effect nullified by Acts of 1969, Chapter 173 (Uni-Gov), which abolished both the county council and the Mass Transportation Agency.

Marion County while permitting those same cities and towns to retain all of their share of such funds for their own use.

There is no unfairness and no constitutional defect in the statutory provision that the Mass Transportation Authority of Greater Indianapolis receive all the payments from the cigarette tax fund that would otherwise be distributed to the cumulative capital improvement funds of the individual cities and towns located within the boundaries of the Authority.

II.

Lawrence further contends that even if the MTA Act did lawfully appropriate some of Lawrence's share of cigarette tax fund distribution to the Mass Transportation Authority that appropriation was terminated by the passage of Acts of 1969, chapter 173 (Uni-Gov), and to sustain this proposition presents the same arguments it presented to sustain its first contention (i.e., legislative intent and unconstitutionality).

Without discussing these arguments individually we note:

1. That section 1401 of the Uni-Gov Act, as found in Ind. Ann. Stat. § 18-4-14-1 (Burns Code Ed.) concerns financing for the Consolidated City and provides in pertinent part:

"(9) Any and all money in the Cigarette Tax Fund of the State available for distribution to the First Class City or any separate authority within the County shall be distributed as follows: All amounts appropriated to the Capital Improvement Board of Managers of the County pursuant to Acts 1947, c. 222, and Acts 1967, c. 296, shall be paid and handled as prescribed and provided by such acts. All amounts distributable

to a transportation authority pursuant to Acts 1947, c. 222, or Acts 1967, c. 311, shall be paid to the Treasurer of the County for the use of the Department of Transportation. Any money distributable to the Consolidated City for the use of the General Fund thereof shall be paid to the Consolidated City."

2. That section 1003, as found in Ind. Ann. Stat. § 18-4-10-3 (Burns Code Ed.) confers powers, duties and obligations upon the Department of Transportation and provides in pertinent part:

"(b) All Transportation Powers heretofore or hereafter conferred by law upon the board of county commissioners, the county surveyor, the county highway department or the county council of the county.

"(c) All the powers, obligations and duties of the Mass Transportation Authority created by Acts 1967, c. 311, and the Metropolitan Thoroughfare Authority created by Acts 1963, c. 386."

Thus in an act that has already been held constitutional (*Dortch v. Lugar* [1971], 255 Ind. 545, 266 N.E. 2d 25), the General Assembly has clearly expressed the intent that the moneys from the cigarette tax fund that would otherwise be distributed to the Mass Transportation Authority pursuant to the MTA Act (i.e., those funds that, were it not for the MTA Act, would be distributed to the cumulative capital improvement funds of Lawrence and all other cities and towns in Marion County) shall be, instead, distributed to a municipal agency with county-wide jurisdiction, duties and obligation.

The judgment is

Affirmed.

Sullivan, P.J., and Buchanan, J., concur.

APPENDIX C

Statutes Involved

Acts 1947, ch. 222, § 27d, as added by Acts 1965, ch. 225, § 5, p. 524; 1967, ch. 296, § 1, p. 966; IC 1971, 6-7-1-32, IND. ANN. STAT., § 64-2928d (Burns, 1972), reads as follows:

"6-7-1-32 [64-2928d]. Disposition of cigarette tax fund—Cumulative capital improvement fund of cities.

—On and after July 1, 1965 one-third [$\frac{1}{3}$] of the entire amount of the cigarette tax fund of the state of Indiana remaining after charges thereto required by section 27a [6-7-1-29] hereby is appropriated for distribution to the cumulative capital improvement fund of cities and towns in like proportion as the population of each city or town bears to the total population of all cities and towns of the state, as determined by the last preceding United States decennial census. The distribution of said sum shall be computed by the auditor of state semi-annually to effect distribution thereof on the first day of June and December in each year, and the auditor of state shall draw warrants to the treasurer of each city or town as designated in the distribution presented to the auditor by said department of revenue.

"Except, that, on and after July 1, 1967, the sum of three hundred fifty thousand dollars [\$350,000] out of the appropriation theretofore made for distribution to the cumulative capital improvement fund of cities of the first class pursuant to this section is hereby appropriated to the capital improvement board of managers of the county created by chapter 326 [18-4-17-1—18-4-17-21; Burns' §§ 26-2801—26-2821] of the Acts of the Indiana General Assembly of 1965 to be used for the payment of principal and interest on any bonds issued or to be issued pursuant to the authority of

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said chapter 326 [18-4-17-1—18-4-17-21; Burns' §§ 26-2801—26-2821] of the Acts of 1965 or any acts amendatory or supplemental thereto. Said sum shall be distributed semi-annually on the first day of June and December in each year and paid to the treasurer of such county upon warrants issued by the auditor of state. The county treasurer shall deposit all amounts received pursuant to this section in the capital improvement bond fund created by section 13 [18-4-17-13; Burns' § 26-2813] of said chapter 326 of the Acts of 1965. It is the intent of the general assembly that said appropriation to such board of managers shall be deducted from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated for distribution to the cumulative capital improvement fund of other cities and towns of the state.

"Provided further, That the remaining funds available for distribution to the capital improvement fund of cities of the first class pursuant to this act is hereby appropriated to the metropolitan thoroughfare authority created pursuant to Acts 1963, ch. 386 [19-5-4-1—19-5-4-21; Burns' §§ 36-3401—36-3420], or to any thoroughfare or transportation authority subsequently created in a city of the first class for use by such authority. Said funds shall be distributed semi-annually on the first day of June and December each year and paid to the treasurer of the county in which such authority is situated upon warrants issued by the auditor of state. The county treasurer shall accept said funds pursuant to said act and the custody of such funds shall be governed by the provisions of said act. It is the intent of the general assembly that said appropriation to such authority shall be appropriated from the distributive share of cities of the first class only, and nothing herein shall be construed as reducing the amount theretofore appropriated to the cumulative capital improvement fund of other cities and towns of the state."

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Acts 1967, ch. 311, § 19, p. 1195; 1969, ch. 235, § 10, p. 871; IC 1971, 19-5-3-18 (a), IND. ANN. STAT., § 36-3449(a) (Burns, 1972), reads as follows:

"19-5-3-18 [36-3449, 48-2468]. Financing. — (a) In order to provide funds for carrying out the duties, powers and obligations of the Authority, the Authority shall receive the following money on and after the effective date [March 11, 1967] of this act, except as provided in this section:

"(1) After December 31, 1969, all of the aggregate of allocated amounts of money collected and available for distribution to the County or the City in the motor vehicle highway account fund of the state as provided for in Acts 1941, c. 168 [8-14-1-1—8-14-1-8], as last amended in Acts 1969 [1965], c. 121, 223, or as later amended or superseded. The auditor of state shall pay over such money, as it becomes available for distribution, to the controller of the Authority. For purposes of such distribution, all roads under the control of the Authority outside of the boundaries of the City shall be a part of the County highway system.

"(2) Any and all money collected from the levy of taxes on property as provided in sections 15 and 16 [19-5-3-14, 19-5-3-15] of this act and collected by the County treasurer.

"(3) Any and all money now available or which shall become available from the federal government through the federal bureau of public roads or any other federal agency created and organized for the disbursement or allocation of federal funds in furtherance of any powers of the Authority.

"(4) Any and all money that may at any time be appropriated by the state of Indiana in furtherance of any powers of the Authority.

"(5) Any and all money heretofore collected and either paid over or payable to the treasurer of the County for the account of any metropolitan thorough-

fare authority in the County created under the provisions of Acts 1963, chapter 386.

"(6) Any and all money received as proceeds from the sale of bonds of the Authority as provided in this act [19-5-3-1—19-5-3-25].

"(7) Any and all money to be collected by the Authority pursuant to any acts providing for the use of parking meters under the control of the Authority, subject to the fulfillment of any obligation pertaining to the collection of such money pursuant to any bonded indebtedness assumed by the Authority.

"(8) Any and all money in the cigarette tax fund of the state available for distribution to the cities and towns in the County for deposit in the cumulative capital improvement funds of such cities and towns pursuant to Acts of 1947, chapter 222 [6-7-1-1—6-7-1-36], as last amended by Acts of 1965, chapter 225, or as later amended or superseded. The auditor of state shall pay over such money, as it becomes available for distribution, to the controller of the Authority. Provided, however, That such money allocated to cities and towns for their respective general funds is not included herein and shall continue to be distributed and paid to the cities and towns in the County as provided by said Acts of 1947, chapter 222 [6-7-1-1—6-7-1-36], as amended or superseded. Provided, further, That all funds appropriated to the capital improvement board of managers of the County by the 95th General Assembly from such cigarette tax funds shall be paid to the treasurer of the County for the use of said capital improvement board, and nothing herein shall be deemed to affect or reduce said appropriations.

"(9) The portion of the Indiana inheritance tax retained by or payable to the County. All such money shall be paid to the controller of the Authority as it becomes available for distribution.

“(10) Any and all money received by the Authority in the exercise of its powers or control and use of its property.”

Acts 1969, ch. 173, § 1403, p. 357; IC 1971, 18-4-14-3, IND. ANN. STAT., § 48-9505 (Burns, 1972), reads as follows:

“18-4-14-3 [48-9505]. Allocation of state funds to excluded cities and included towns.—This act [18-4-1-1—18-4-15-2] shall not affect or limit the right of each excluded city and included town to receive the same allocations of moneys collected by the state of Indiana as are allocated to the same under other applicable law, including allocation from the motor vehicle highway account fund with respect to roads which the same maintain and allocations from the cigarette tax fund and alcoholic beverage fee and tax allocations as provided by applicable law.”

NOV. 8 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
Term, 1978

No. 76-401

CITY OF LAWRENCE, INDIANA, Appellant,

v.

CITY OF INDIANAPOLIS, INDIANA, MARY D.
AIKINS, Auditor of the State of Indiana; and
LAWRENCE L. BUELL, Treasurer of Marion County,
Indiana, for and on behalf of the Department
of Transportation of Consolidated First Class
City of Indianapolis, Indiana, Appellees.

**ON APPEAL FROM THE SUPREME COURT OF
INDIANA**

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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To the appellees' quoted sentence from *Williams, Receiver of the Washington, Baltimore & Annapolis Railroad Co. v. Mayor and City Council of Baltimore*, (1932) 289 U.S. 36, should be added another rule set forth therein that statutes involving fanciful evil and illusionary injustices and wrongs may be stricken as violating the Fourteenth Amendment to the Federal Constitution. The bankrupt railroad was the only means of transporting mil-

lions of passengers into its largest city. The need for temporary assistance for two years to keep it in operation was of such special and significant public importance to justify the special law, since general laws did not cover it.

The underlying principle, upon analysis, in appellees' cited cases of *Trenton v. New Jersey*, (1922) 262 U.S. 182, 67 L. Ed. 937, 43 S. Ct. 534, and *Newark v. New Jersey*, (1922) 262 U.S. 192, 67 L. Ed. 943, 43 S. Ct. 539, actually supports appellant's position. The statute regulating the use of water and the assessment and collection of fees was part of the powers and authorities of the state in the interests of *all the cities and towns in the state*. This included Trenton and Newark, as well. Therefore, they could not invoke federal constitutional restraint against the state from imposing a license fee or charge for diverting water specified in the state law *for use by all of its residents*.

The appellees refer to dictum in *Dartmouth College v. Woodward*, (1819) 4 Wheat. 518, in attempting to convince this Court that municipalities do not have constitutional rights independent of those expressly provided by the state. That court said that even though such legislation under question might be suitable for despotic powers, it cannot prevail anywhere in the United States. It was not only subject to judicial review, but it was stricken.

Appellees' cited case of *Worcester v. Worcester Consol. St. Ry.*, (1905) 196 U.S. 539, 49 L. Ed. 591, 25 S. Ct. 327, held that municipalities are subject to their legislature's control, except where there are restrictions by constitutional prohibitions, both state and federal.

Appellees' cited case of *County Department of Public Welfare v. Potthoff*, (1942) 220 Ind. 574, 44 N.E.2d 494,

also supports the appellant's position. Pursuant to a 1936 statute, a county department of public welfare made an award of old age assistance to an applicant with the understanding such payment became a lien against all of his real property. Upon his death, a claim was filed in his estate to recover the amount paid under the welfare grant. Thereafter, the Indiana State Legislature amended said act by striking out the provisions creating the lien for such old age assistance. Subsequently, a denial of the claim was affirmed because the Supreme Court could not and would not tolerate such an arbitrary classification which authorized old age assistance to be extended after a given date to the members of one group of citizens upon the condition the state retained a lien on their properties while at the same time assistance could be extended to those of a like group with the same inherent needs without such requirement.

At page 498, that case laid down this rule:

"There is no better means for ascertaining the will and intention of the legislature than that which is afforded by the history of the statute as found in the journals of the two legislative bodies."

The Court then went into the legislative history indicating conclusively the General Assembly had before it, considered it and rejected the propositions presented. Appellant has pointed out this legislative history and its application in its jurisdictional statement; however, the appellees have elected to waive any consideration of this important issue.

Appellant agrees there is no vested right to the cumulative capital improvement cigarette tax distribution fund. Since it was created by the Legislature, it has the power to take it away. However, if this is done, it must affect

all cities and towns in the state and not just the appellant and three other cities and towns who have the same burdens, duties and responsibilities as the favored class.

Even though state legislatures have wide discretionary powers, there comes a point beyond which they may not go without violating the equal protection clause guaranteed by the Fourteenth Amendment to the Federal Constitution, whether it affects municipal corporations or other county units of government or individuals or private corporations.

Allied Stores of Ohio v. Bowers, (1959) 358 U.S. 522;

Ohio Oil Co. v. Conway, (1930) 281 U.S. 146;

Cincinnati H. & D. Ry. Co. v. McCullom, (1915) 183 Ind. 556, 109 N.E. 206, aff'd 245 U.S. 632;

Kraus v. Lehman, (1908) 170 Ind. 408, 83 N.E. 714;

Town of Longview v. City of Crawfordsville, (1905) 164 Ind. 117, 73 N.E. 78;

56 Am. Jur. 2d, Municipal Corporations, Counties and Other Political Subdivisions, § 106, p. 164.

It is difficult to imagine how a more substantial federal question could be presented. In construing a per capita revenue sharing type statute, Indiana's highest Courts, in direct violation of direct authority *everywhere*, including it's own, have picked and chosen just certain parts of the statute and left out other controlling parts. In so doing, it created a favored class, who receives large and substantial distributions, and burdens an unfavored class of many thousands of people and involves great sums of their money, who do not receive their shares, when both classes are in like situations and have the same inherent needs. Appellees have refused to address their motion to dismiss

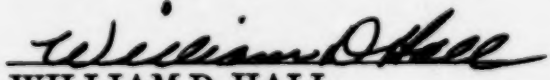
or affirm to this question, properly presented by the appellant in its jurisdictional statement. It is clear they have conceded that appellant's position is sound and the fact that this Court should grant review of this case and reverse the Court of Appeals and the judgment of the Trial Court.

CONCLUSION

The taking of appellant's designated distributive share from it and paying it to others, the construction of just part of the controlling statute in violation of clear authority, and the appellees' refusal to come to grips with the questions presented are textbook examples of the need for and the function of the Fourteenth Amendment to the Federal Constitution. Appellant feels that its needs for turning of this Court for relief are at least as great as others, which are reflected by the long line of decisions granting similar relief. The granting of the relief requested of this Court is as important to the appellant as all the previous ones, and perhaps more so for the reason that if this decision is left stand it will lay the groundwork for the ultimate destruction of the appellant and other cities and the rights of thousands and ultimately millions of people.

This Court should grant a review and reverse the decision and judgment of the Trial Court.

Respectfully submitted,


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